

USE OF EXPERT OPINION IN THE CRIMINAL JUSTICE SYSTEM OF BANGLADESH

*With Contemporary
Progress*

Submitted To
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3rd Year

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1. Introduction

Witnesses are the eyes and ears of justice¹. The general rule is that a witness is allowed to give evidence regarding the matter in question what he saw, heard and perceived by his senses.

According to section 60 of Evidence Act, 1872, oral evidence must be direct. It means that only those witnesses may appear before the court who have been well acquainted with facts, because every witness is a witness of facts. But there is an exception to this general rule. Under sections 45-51 of the Act a third person unknown to the facts may give evidence when the court invites him. Besides this law, there are many other laws which allow evidence of third person.

2. Opinion of Expert

Sections 45, 46, 51 of the Evidence Act speak about the opinion of expert.

Expert: An expert is a person who has got special skill, education or training in a particular subject in science, technology or discipline. He is distinguished from an ordinary person by this qualification.² According to section 45 an expert is a person specially skilled in science, art, foreign law, identity of handwriting and finger impressions.

Opinion: It was observed in *Forest Rang Officer vs P. Muhammed Ali*³, that “opinion means something more than gossip or hearsay. It must be based on some belief, reasoning or result. However the expert opinion is only an opinion evidence on either side does not aid court in interpretation”.

Therefore, expert opinion means the opinion of a person who is skilled in a particular field of study for which Court seeks his expertise to perceive any complexity arose in the case for the convenience of justice.

2.1 Principles of Expert Opinion

In *Turner* (1974), Lawton L J said, an expert opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of expert is unnecessary. There are a few classic principles to use expert opinion which should be strictly followed. In 1993, a shipping case known as *The Ikarian Reefer*, Mr Justice Cresswell set out what are regarded as the classic statement of the duties and responsibilities of expert witnesses. These are principles which have been endorsed by the courts in other cases. These are the principles-

1. Expert evidence presented to the court should be and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. The principle that expert reports should be independent stands and experts have a duty to help the court on matters within their expertise and that duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. So, the scope of an expert's opinion will be limited in line with the court's directions and needs to address issues within an expert's expertise.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his/her expertise. An expert witness in the High

¹ Bentham, philosopher

² Muhammad Nazrul Islam, *Reflection of law of Evidence*, (second edition) p. 242.

³ AIR 1994 SC 120

Court should never assume the role of an advocate. One test of independence of an expert's evidence is whether the expert would give the same opinion if instructed by the other party.

3. An expert witness should state the facts or assumptions upon which his/her opinion is based. He/she not omit to consider material facts which could detract from his/her concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

R vs Pabon is a case where an expert failed to do this. In a criminal case about rigging LIBOR (interbank lending rates) the expert gave evidence at short term interest rates, a matter outside his expertise. The judge described him as no more than an enthusiastic amateur and criticized his lack of independence as corrosive to justice.

5. If an expert's opinion is not properly researched because insufficient data are available, then this must be stated with an indication that the opinion is no more than provisional. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth is nothing but the truth without some qualifications that qualifications should be stated in the report.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

3. Use of Expert Opinion in various laws

	Name of the Law	Provisions	Who	Area/Field
1.	Evidence Act,1872	45,46,51,112,	Expert	Finger print, handwriting, forensic (inclusive, not exclusive)
2.	The Code of Criminal Procedure,1898	174,464,474,509,509A,510	Civil Surgeon, Medical witness, Chemical examiner, Serologist	Handwriting, fingerprint, fire arm, post mortem
3.	Digital Security Act,2018	41,46,51,58	Expert, any specialized organization	Computer Science, Cyber Forensic, Electronic Communication, Data security etc.
4.	DNA Act,2014	2(9),38	Employee of DNA laboratory	DNA

5.	Pornography control Act,2012	6,7	Officer or Person empowered by govt.	Digital evidence relating to pornography
6.	Anti Terrorism Act,2009	25	Expert	Medical, Forensic, Finger print
7.	Prevention of Women and Children Repression Act,2000	23,32	Expert (government and non-government)	Forensic, Ballistic, Medical
8.	Formalin Control Act,2015	32	Chemist	Forensic, Chemistry
9.	Anti Corruption Act,2004	23	Expert	Matters related to corruption
10.	Army Act ,1952	116	Chemical Examiner	Any matter submitted for examination
11.	Air Force Act,1953	140	Chemical Examiner	Any matter submitted for examination
12.	The Navy ordinance ,1961	120	Chemical Examiner	Any matter submitted for examination
13.	Cantonments Pure Food Act,1966	28	Chemical Examiner	Food
14.	আইন-শৃঙ্খলা বিঘ্নকারী অপরাধ (দ্রুত বিচার) আইন, ২০০২	14	IT Expert	Digital Evidence
15.	অপরাধ সম্পর্কিত বিষয়ে পারস্পরিক সহায়তা আইন, ২০১২	15	Expert	
16.	Acid Control Act, 2002	48	Chemist	Acid
17.	The Arms Act, 1878	30A	Expert on arms and ammunition	Arms and ammunition

3.1 Relevancy and Admissibility of Expert Opinion

All evidence is relevant unless declared as irrelevant. Evidence must be relevant to be admissible. Expert evidence is not an exception to this general rule. The above table clearly shows on which ground and under which law expert evidence is relevant and admissible.

3.2 Use of Expert Opinion in case of crime against women

According to section 23 of Prevention of Crime against Women and Children, 2000 Any doctor, chemist, assistant chemist, pathologist, handwriting expert, finger-print expert, or armament expert who submitted the report by testing or analyzing anything at any receding of an offence,

whose evidence is needed at the trial, but he cannot be found or the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the test report signed by him may be taken as evidence in a trial under this Act. But the Tribunal cannot punish the accused only on the test report.

Medical test of a woman or a child being raped shall be taken no sooner had the rape is committed.⁴ If the medical test is not taken immediately, the Tribunal can direct the appointing authority of the doctor to take step against him for negligence in duty.⁵

*Police Regulation of Bengal*⁶ in direction IX speaks about murder of women for gain. In all cases of murder of women for gain investigating officers shall examine the deceased's tongue in order to see whether it bears marks of injury. If marks are found, the Civil Surgeon shall be specially asked if they appear to be self-inflicted, and if not, how they might have been inflicted. Direction of the said appendix speaks about sending in lower garments worn by the persons when assaulted for examination in case of rape or unnatural offence cases. So it's quite clear that expert opinion is also sought for crime against women.

3.3 Grounds of Expert Opinion in brief

3.2.1 Fingerprints

Fingerprinting is one form of biometrics, a science which uses people's physical or biological characteristics to identify them. Fingerprints are unique and never change, even as you get older, unless the deep or 'basal' layer is destroyed or intentionally changed by plastic surgery. This enables them to be used as evidence in a crime. No two people have the same fingerprints⁷; not even identical twins.⁸ Fingerprint evidence can play a crucial role in criminal investigations as it can confirm or disprove someone's identity. It was held in *Rahimuddin v. State*⁹ that opinion given by fingerprint expert is reliable.

It was held in *Keshavlal v. State of M.P.*¹⁰ that before the seizure of weapon of offence, if many people handled it then there will be no effect of non-examination of the finger-print expert in any way.

3.2.2 DNA

DNA (Deoxyribonucleic acid) matching is a wonderful investigative tool. DNA evidence can provide powerful evidence in support of a prosecution case. DNA evidence can also provide convincing evidence of a person's innocence. DNA is generally used to solve crimes in one of two ways. In cases where a suspect is identified, a sample of that person's DNA can be compared to evidence from the crime scene. Crime scene evidence can also be linked to other crime scenes through the use of DNA databases. In case of *Pantangi Balarama Venkata Ganesh v. State of*

⁴ Section 32, Prevention of Crime against Women and Children, 2000

⁵ *ibid*

⁶ APPENDIX –XIX (Regulation 303)

⁷ Sanjay @ Papdya @ Pawan @ Prashant ... vs The State Of Maharashtra, 2014

⁸ An Insight into Textbook of FORENSIC MEDICINE and TOXICOLOGY by Anil Aggrawal, p-103

⁹ 12 DLR 453 (1960)

¹⁰ AIR 2002 SC 1221

A.P.¹¹ it was held that the evidence of DNA expert is admissible in evidence as it's a perfect science.

In *Anandamay Bag vs State Of West Bengal And Anr.*¹² It was held that the DNA test is necessary to ascertain the fact of alleged rape as well as for ascertaining the paternity of the child of the victim girl. The Bombay High Court held that DNA test is clinching piece of evidence and such test is foundation of establishing heredity. In the Bombay matter also the DNA test was directed during stage of investigation and in that matter-DNA test was actually held during the stage of investigation. None of the decisions accordingly show that DNA test in a rape case can be directed after closer of both prosecution and defense case and during the stage of pendency of delivery of judgment.¹³

In the case of *Bangladesh Jatiyo Mahila Ainjibi Samity v. Bangladesh*¹⁴, the HCD solved the case by Sibling DNA testing conducted in order to determine if two or more children share one or both biological parents in common. It was alleged that the Former Deputy Inspector General of Police (DIG) of Bangladesh and his wife Mrs. Anwara Rahman used to procure seven children of various ages in order to traffic them out of the country but they claimed that they are the parent of those children's. But Result of Sibling DNA Test shows that all the seven children are unlikely to be related to each other. After the enactment of DNA Act, 2014, DNA related issues are dealt with the Act.

3.2.3 Handwriting

An expert is a person who has got special skill, education or training in a particular subject of science, art, technology or discipline.

There are different branches of evidence where opinions of experts are taken by the judges in course of judicial proceedings. Handwriting is one of them.

Section 73 of the Evidence Act 1872 talks about signature, writing or seal made by any person. It says, "In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. This section applies also, with necessary modifications, to finger impressions."

There are some rules regarding the use of expert opinion in terms of handwriting. Some case laws can be mentioned to understand the rules.

As per his lordships A.Subhan Chowdhury, J. in *Md. Shamsul Hoque Vs State*¹⁵ "Opinion of the hand writing expert as to the authorship of the questioned writings or signatures is not infallible; on the contrary it is not a safe guard for leading to any conclusion and adopted the principle that 'We are conscious that the science of the study of calligraphy is inexact and has not yet attained any degree of accuracy. Hence the opinion of hand writing expert should be received with great caution and it is unsafe to base a decision purely on expert opinion without sufficient corroboration'(per his lordship M.R Khan, J., in *Eskandar Ali Vs Alhamra Begum*¹⁶)

¹¹ 2003 Cr LJ 4508(AP)

¹² Indiankanoon.org

¹³ Raghuvir Dessai v. State, 2007 Cr. LJ 829

¹⁴ Writ Petition No. 5359 of 2006

¹⁵ 20 DLR 540

¹⁶ 19 DLR 791

The observation of his lordship Shahabuddin ,A.C.J, in Rafiq Ahmed Vs State¹⁷ was that the mere fact that the writing therein contained all the peculiarities of the hand writing of the approver does not by itself exclude the possibility of a person knowing the approver's handwriting and being clever at forging documents having forged his writing.

The court is not bound to take the assistance of a handwriting expert where the court is satisfied with its own examination of it. Handwriting experts are called to assist the court when their assistance is considered necessary by the court. Instead of sending a handwriting to an expert, the court may compare it by itself and come to its own decision. Further, where the expert had submitted his opinion with regard to a handwriting upon examination, the court has discretion to ignore that opinion and hold a comparison to form its own opinion.

3.2.4 Trace Evidence

Trace materials include human hair, animal hair, textile fibers and fabric, rope, soil, glass, and building materials. The physical contact between a suspect and a victim can result in the transfer of trace materials. The identification and comparison of these materials can often associate a suspect to a crime scene or with another individual.



¹⁷ 11 DLR SC 91

দীর্ঘ এক বছরের পরিকল্পনায় ঠাণ্ডা মাথায় খুন করা হয়েছিল গাইবান্ধার সুন্দরগঞ্জ আসনের সরকার দলীয় এমপি লিটনকে। পেশাদার খুনির বদলে ভাড়া করা হয়েছিল হতদরিদ্র ঘরের তিন যুবককে। বিভিন্ন প্রলোভনে কর্নেল (অব:) ডা. আব্দুল কাদের খান নিজেই তাদের ৬ মাস প্রশিক্ষণ দিয়ে সফল ভাবে শেষ করেছিলেন এই কিলিং মিশন।

সংবাদ সম্মেলনে সুন্দরগঞ্জ থানার তৎকালীন ওসি আতিয়ার রহমান জানান, বিগত ২০১৬ সালের গত ১ ডিসেম্বর দিবাগত রাত সাড়ে ১২টার দিকে গাইবান্ধা-সুন্দরগঞ্জ সড়কের ধোপাডাঙ্গার নয়া বাজার এলাকায় ফাহিম নামে এক যুবকের একটি মোবাইল ছিনতাইয়ের ঘটনা ঘটে। এ সময় ছিনতাইকারীরা তাড়াহুড়ো করে পালাতে গিয়ে অসাবধানতা বশত: ৬টি গুলিসহ একটি ম্যাগাজিন ফেলে রেখে যায়। সোনারায় ইউনিয়নের চেয়ারম্যান সৈয়দ বদিরুল আহসান বিষয়টি স্মরণ করে দেওয়ায় পর পরীক্ষা করে দেখা যায় এমপি লিটনের শরীর থেকে অপারেশন করে বের করা গুলি এবং তার বাড়িতে হত্যার পর প্রাপ্ত গুলির খোসার সঙ্গে কুড়িয়ে পাওয়া ওই ম্যাগাজিনের গুলির মিল রয়েছে। পরে ওই সূত্র ধরে ৫২ দিন পর এমপি লিটন হত্যার মূল রহস্য বের হতে শুরু হয়।



The report shows the value of trace material in criminal justice system. If trace material can be collected carefully, perpetrator will be caught easily.

4. Corroboration of Expert Opinion

Corroboration is not a technical term. It simply means 'confirmation'.¹⁸ Corroboration is independent testimony that affects the accused by connecting or tending to connect him with the crime. It must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that a crime has been committed, but also that the prisoner committed it.¹⁹

Corroboration is not always necessary if trustworthy. The certificate of the Chemical Examiner shall be sufficient to prove the facts therein stated unless contrary is proved.²⁰

Corroboration may not be invariably insisted upon. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated.²¹ The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it.

It was held in *Murari Lal v. State of MP*²² that “We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that the opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution. Reasons for the opinion must be carefully probed and

¹⁸ DPP v Hester [1973] A.C. 296

¹⁹ R. v Baskerville (G) [1916] 2 K.B. 658

²⁰ Section 28(2), Cantonments Pure Food Act, 1966

²¹ Dr. Avtar Singh, “Principles of the Law of Evidence”, Central Law Publications, Allahabad, 21st edn., 2014, p. 253

²² AIR 1980 SC 531, at p. 536

examined. All other relevant evidence must be considered. In appropriate cases, corroboration must be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, an uncorroborated testimony of a handwriting expert may be accepted.”

It was held in *Eskandar Ali Vs. Most, Alhamara Begum*²³ that “ since the standard of calligraphy has not yet reached the degree of accuracy, the opinion of the Handwriting expert cannot be accepted as absolutely correct and as such it should be taken into consideration with caution and corroborative evidence will be necessary. The opinion of the handwriting expert is not binding and the court can also make its own comparison to form its opinion appropriate to the situation.” It was held in another case²⁴ that “the proof of genuineness of a document is of the authorship of the document and is proof of a fact like that of any other fact. The opinion of handwriting expert should be received with great caution and it is unsafe to base a decision purely on expert opinion without sufficient corroboration. In the instant case, taking opinion of the handwriting expert on comparing the siquantive and thumb impressions of the plaintiffs in Court on their physical appearance is not necessary. Plaint or written statement after it has been filed in court and registered becomes a public document and thus the court is competent to form its opinion on a comparison of the handwritings and signatures appearing on the materials on record with the signatures appearing on the disputed solenama.”

An expert may be both corroborated and contradicted by standard treatises or text-books on the subject if the author is dead or cannot be found, etc.²⁵ ; or if the matter is covered by Section 57 which bears a list of facts judicially noticeable by the Court. Opinion of one expert can also be contradicted by that of another expert. Corroboration of expert opinion is not always necessary as per decision of *Prafulla Kamal Bhattacharaya vs. Ministry of Home Affairs, Govt. of Bangladesh*. However it was observed that the evidence of a doctor conducting post mortem without producing any authority in support of his opinion is insufficient to grant conviction to an accused.²⁶

It needs, however, be noted that, there is no prescribed standard or measure of corroboration or contradiction to the expert-evidence. The real standard or measure of corroboration is the satisfaction of the Court.²⁷

5. Evidentiary Value of Expert Opinion

The value of expert opinion rests on the facts on which it is based and his competency for forming a reliable opinion.²⁸ The Act only provides about the relevancy of expert opinion but gives no guidance as to its value. The value of expert opinion has to be viewed in the light of many adverse factors as follows:

- Danger of error or deliberate falsehood
- Fallible judgment of human because of not being master in all the knowledge on any of the sciences

²³ Supra note 15

²⁴ Sreemati Hajari Roy and others v. Arun Kumar Singha and others, 22 BLD (HCD) 169

²⁵ Vide Proviso to Section 60

²⁶ Mohd Zahid v. State of Tamil Nadu, 1999 Cr LJ 3699 (SC)

²⁷ REFLECTIONS ON THE LAW OF EVIDENCE, SECOND EDITION, MUHAMMAD NAZRUL ISLAM, p-250

²⁸ Ramesh Chandra Agrawal vs Regency Hospital Ltd. & Ors. on 11 September, 2009

- Partiality in favor of the party called

The reliability of such evidence has, therefore, to be tested in the same way in which any other piece of evidence is tested. The court should, therefore, call upon the expert to explain the reasons for his opinion and then form its own opinion as to whether or not the expert opinion is satisfactory.

Where expert opinion is relevant expert has to be heard as a first and foremost requirement. The expert should be competent in his field. He is not to act as a judge or jury. He is not a witness of fact. His evidence is of advisory character. His credibility depends on reasons stated in support of his conclusions and data and material furnished which formed the basis for the same.

6. Statistical data

As provided in several news reports and statistics conviction rate in our Human trafficking cases is 0.08%, 3% in Cybercrime cases and overall criminal conviction rate 5.7%. Probably we have one of the lowest conviction rates in the world. One of the reasons is not getting reports of expert relating to the case in a quick manner and sometimes due to tainting evidence proper result is not found. Thus expert opinion affects conviction rate. We studied 86 cases²⁹, judgments of which were given during 2012 and 2018, connected with expert opinion. Among them Court gave conviction relying on expert evidence in 34 cases. Acquittal was given in 14 cases and gave other directions in the rest cases.

7. Experts' view

We took an interview of **Justice Farid Ahmed**, *High Court Division of Supreme Court of Bangladesh*. He said “Expert opinion is not a conclusive piece of evidence. It is merely an aid to the court. The Court is not bound by the expert. It can even reject the expert opinion if found otherwise in the record. If the court feels, in any cases, that the expert opinion is a necessary aid to meet the ends of justice, then the court can, with due caution, consider the expert opinion. The qualification of the expert must be of serious concern to the Court before any reliance can be placed upon the opinion”. He also observed in the event when evidence was not collected properly. He said “If not taken properly, then other available pieces of evidences must be relied upon. The expert can request the Court to give an order to gather other required pieces of evidence needed for giving an opinion”.

According to **A.K. Nazmul Hossain**, *Inspector, Photography Section, Forensic Division, CID*, he opined that “We have enough digital equipment to identify the victim or accused or anything. But according to section 509(2) if court orders to attend before court, they have to attend before court to ascertain the report concerned. As only 6 persons are working as expert in photography department, and they have to go all around the country it is quite impossible to finish all the cases. So, they cannot work on all cases. New crimes specially digital crimes are committed again and again, but experts are very few in the field of digital crime sector.

According to **MD Khairul Islam**, *Inspector, Fingerprint expert, CID*, he opined that

²⁹ Appendix A

“Most of the cases we work manually, only few cases we depend on digital machine. Since joining in the department, no training project has been held. They extremely need training project. They also have short of man-power. The duty to collect evidence has been newly conferred on Sub-Inspector of Police, who are unskilled. So, they cannot take evidence properly, and many times they destroy the evidence”.

According to *Abu Taher Faruqui*, ASP, *Ballistic Report*, CID, he opined on the field of Ballistic. He said “We suffer from the ignorance of police collecting evidence. Police specially local police have no skill. They are not trained. In collecting evidence the police destroy evidence and they cannot protect evidence. The police sometimes describe evidence wrongfully in report. A conflict is, therefore, created between police report and expert report.

8. Contemporary progress in other jurisdiction

8.1 Bangladesh and India:

Section 45A of Indian Evidence Act inserted a new provision regarding opinion of examiner of electronic evidence. But there is no such provision in our Evidence Act. So it is often seen that there is contradictory perspective relating to the issue. Rifat murder case and Abrar Fahad murder case can be referred on the issue which is the talk of the country now.

Section 47A of Indian Evidence Act speaks about the opinion as to electronic signature when relevant. There is no such provision in our Act. We recommended some new provisions in this regard as discussed in the recommendation part.

8.2 Bangladesh and Zanzibar:

Zanzibar Evidence Act is more liberal regarding expert opinion than our Evidence Act. Section 3 of this Act provides that expert means a person qualified to testify on scientific, technical, professional or on other specialized issue because of familiarity with the subject or special training in the field. They also added section 52 regarding digital signature.

The Act encourages both Govt and private experts. Though our Evidence Act doesn't discourage private experts but section 174(3) of the Code of Criminal Procedure is bar in this regard. But it's a matter of hoe that many special laws permit private experts also. A person who has familiarity or special training in the field can be an expert. Our Evidence Act doesn't give any definition like this, except section 45 which is vague in nature. We have no section like section 52 of Zanzibar Evidence Act or section 47A of The Indian Evidence Act regarding digital signature.

8.3 Bangladesh and Bhutan:

According to section 23 of The Evidence Act of Bhutan without oral evidence an expert opinion can be admissible with the leave of the court. But there is a condition of examination of the court. The court will examine –

(a) The content of the report;

(b) The reasons why the expert, who wrote the report is not giving oral evidence at the legal proceeding; and

(c) Any other circumstances that appear to the Court to be relevant and need to be considered in the interest of justice.

We have already enacted some laws (mentioned earlier in a heading) which excludes the presence of the expert for examination. This provision can create some trouble because there is no chance to examine the expert.

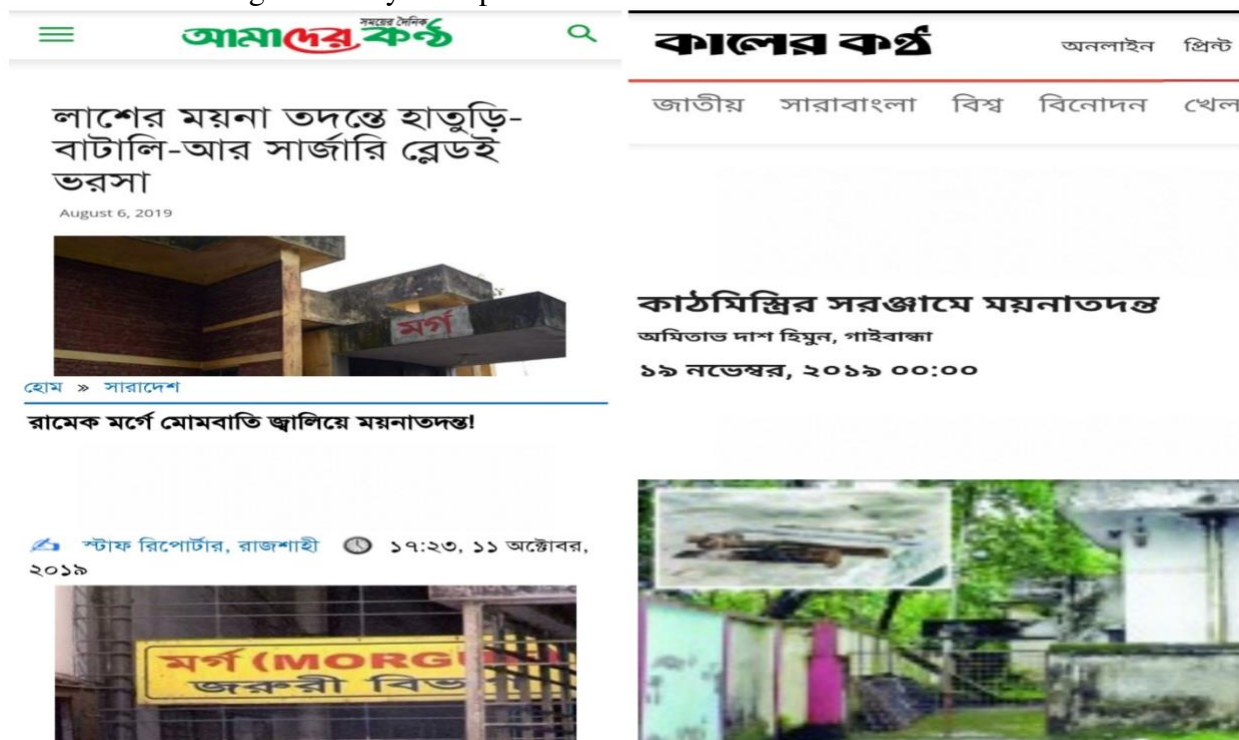
9. Challenges for getting expert opinion

1. As to Shortage of man-power:

Doctors are reluctant to work as a civil surgeon. As their salaries are not sufficient. They have not enough equipment to do the work properly. Training projects are not often held, so there is a shortage of skilled civil surgeon. A few surgeon cannot fulfill the needs of the present day.

2. As to shortage of equipment

The morgues are not well-equipped with digital particulars essential for post mortem. The inner scenario of the morgues is very decrepit.



Instead of using digital means like Bone Cutting Forceps, our civil surgeon are using local equipment like hammer, chisel, surgery blade etc. in case of post mortem. Another article showed that in Feni morgue the surgeons were using hammer, chisel, blade as last reliance. Freezers are not sufficient, among these many are not working.

3. As to collecting trace evidence:

Trace materials include human hair, animal hair, textile fibers and fabric, rope, soil, glass, and building materials. The physical contact between a suspect and a victim can result in the transfer of trace materials. The identification and comparison of these materials can often associate a suspect to a crime scene or with another individual. Investigation is a goal-oriented mission like a tiger chasing a deer.³⁰ Violation of protocol in case of collecting trace evidence is often seen. Recently in a murder case of a BUET student, Abrar Fahad, violation of protocol of collecting trace materials was seen and questioned by people in social media. Every contact leaves a

³⁰ 68 DLR (2016) 466

trace.³¹ If the trace evidence can be collected consciously, real offender can be found easily. But unfortunately in our country amateurism in collecting trace evidence is a hinderance of getting accurate report.



Everything changes with the passage of time.³² It is seen that delay occurs in our country in collecting trace material becomes a barrier to get justice.

4. As to getting immediate report:

Sometimes evidence is destroyed due to delay. Delay is occurred due to lack of manpower and shortage of forensic lab in our country. That's why all the viscera of the country are sent to those labs. Sometimes before reaching to laboratories viscera get mouldered. That is why satisfactory expert opinion in this regard can't be found.

5. As to bar of non-government expert:

Section 23 of The Prevention of Women and Children Repression Act, 2000 bars the opinion of non-government expert. There are laws in this regard such as The Navy ordinance, 1961, Anti Corruption Act, 2004 and Air Force Act, 1953.

There is a common phenomenon in our country that non-government expert is discouraged though the Evidence Act is silent about the admissibility of non-government expert, i.e. doesn't prohibit. **The Evidence Act of Zanzibar, 2016** is more liberal in this regard. The Act provides that expert means a person qualified to testify on scientific, technical, professional or on other specialized issue because of familiarity with the subject or special training in the field.

6. As to manipulation of expert:

³¹ Edmond Locard, Criminologist

³² Principle of Progressive Change

The Court suspected in the case of *State vs Md. Rafiqul Islam*³³ that forensic expert was manipulated before giving his opinion in respect of inquest report. They didn't mention all the injuries of the victim's body. So the Court directed further inquiry as to whether there is any misconduct in furnishing his opinion in the report.

7. As to contradiction between FIR and expert opinion:

Sometimes in case of arms recovery police become unable to identify the name and details of arms and they write the name and details of the arms erroneously. That's why the opinion of the expert and the police report become contradictory. In such case defence can raise reasonable doubt.

10. Recent Trends:

- **The State and others Vs Md. Nazimuzzaman Yon and others (LEX/BDHC/0158/2018)**

An expert from National Forensic DNA Profiling Laboratory at Dhaka Medical College gave opinion about the murder from some blood stain and cotton swabs of the two deceased persons. She proved two DNA test reports. The opinions of experts were corroborated and the court, along with other evidences, considered it and on the basis of all the evidences the death reference was rejected.

- **State Vs Shah Alam Kazi (LEX/BDHC/0167/2018)**

The opinion of expert was taken in respect of cause of death. The court referred a case, *Mafabhai Nagarbhai Raval Vs State of Gujrat*³⁴ where the court stated that, it is needless to say that the doctor who has examined the deceased and conducted the postmortem report is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective, the court can't substantiate its opinion for that of doctor. In this case the court took the opinion. However the court gave judgment on the basis of confessional statement.

- **State Vs Tofayel Ahmed 71 DLR (2019) 57**

In this case the opinion of medical expert was taken as to the injuries of the dead bodies and the cause of death. He said that the injuries were ante-mortem and death was due to violent asphyxia resulting from strangulation by ligature which is homicidal in nature. This opinion was corroborated and the court relied on this. However, the order of conviction and sentence were upheld and confirmed considering all the forensic evidences, expert opinion and confessional statement of the accused.

- **State Vs Md. Rafiqul Islam 23BLC (2018) 802**

The opinion of forensic expert was taken as to the injury and cause of death. The forensic experts found many injuries in the dead body of victim and opined that the death was caused due to shock and hemorrhage as a result of injuries which were ante-mortem. In the cross examination the forensic expert stated that the fractures and injuries as found may be caused by falling from

³³ 70 DLR (2018) 26

³⁴ 4 SCC(2011)249

height. Mainly on the basis of opinion of medical experts the court gave the judgement that the death was not murder, it is suicide and the accused is acquitted of the charge.

- **State Vs Abdur Rahman** LEX/BDHC/0163/2018

The opinion of expert was given as to some photographs and injury and cause of death of the deceased. The photograph was proved to be correct. In respect of the cause of death the medical expert opined that the injury in the scrotum was post mortem. They did not find existence of any injury in the scrotum before death. However, the cause of death was confusing and do not disclose any injury as ante-mortem and homicidal. The court rejected the death reference and the two accused are acquitted.

- **Asif Iqbal Vs State and others** 24BLC(2019)113

The opinion of handwriting expert and IT expert were taken in respect of fake id, website and handwriting of a deed. The case is under section 57 of The Information and Communication Technology Act-2006. In this appeal, the judgment of session court was upheld and confirmed based on the opinion the opinion of expert and circumstances.

- **The State Vs Qamrul Islam and others** LEX/BDHC/0019/2017

The medical expert opined that the death of victim was due to hemorrhage and shock resulting from the bullet injury which was ante-mortem and homicidal in nature. The AD upheld the judgment of death reference.

- **State Vs Md. Nasiruddin** 23 BLC 2018

The opinion of expert in medical evidence is not binding on the ocular. The opinion of the medical officer to assist the court as he is not a witness of fact and the evidence given by the medical officer is really of an advisory character and not binding on the witness of the fact. The opinion of medical expert was not accepted in this case.

- **Subroto Pal Vs State and others** LEX/BDHC/0272/2017

The opinion of handwriting expert was accepted and on the basis of it and other evidences, judgment was given.

- **State Vs Md Rafiqul Islam and others** 70DLR (2018) 26

Inquest report does not mention all the injuries on the victim's body. The court said that there is no scope to throw away the expert evidence. The court directed further inquiry as to whether there is any misconduct in furnishing the opinion in the post mortem.

- **Shah Kutubuddin Talukder Vs State** 70 DLR (2018) 618

In this case the court gave its opinion that, "in an appropriate case a judicial magistrate should take aid of experts (forensic / ballistic / handwriting) etc. in carrying out judicial inquiry with an aim to arrive at a conclusive inquiry report on the offences.

- **Md Nazmul Haque and others Vs State and others** 70 DLR (2018) 293

In this case the opinion of medical expert played a pivotal role in the judgment. The court formed its judgment not interfering in the order of framing charge passed by the learned Session Judge on the basis of opinion of medical expert and other evidences.

- **Md Aminul Haque Vs State and others** LEX/BDHC/059/2017

In this case the advocate of the respondent submitted that the evidence given are impartial and there is expert opinion in support of it. But court, considering other things and evidences, rejected this.

- **The State and others Vs Oyshee Rahman and others** 25 BLT 2017 (HCD) 503

Md Kaiser Rahman, is a chemical expert who examined the viscera of the deceased Mahfuzur Rahman and Swapna Rahman (parents of Oyshee Rahman) and reported that no poison was detected in the viscera and blood of both the deceased but Bromazepam was found. Residuary of the coffee in the cup was examined and found Bromazepam. This is considered as an strong evidence that Bromazepam was given to make them unconscious for the purpose of murder.

- **Abdul Awal vs S.M Asaduzzaman and Others** 11 ADC (2014) 87

Attorney General Mahbube Alam argued that Simply relying on hand writing expert The HCD can't quash any proceedings. The opinions of the hand writing expert become evidence unless he depose before the court. AD relied on handwriting expert.

- **Akbar Ali lal vs State(Khalaf murder case)** 66 DLR (2014) 134

Yousuf Humayun, learned Advocate on behalf of the condemned appellant contends that admittedly the finger prints on revolver was not examined by expert, so the finger print is not admissible. PW 29,30,31 contended that they were under duty as ballistic expert and examined the revolver. PW 32 states that he pursued DNA test of trousers, underwear, vest and keds to the National Forensic DNA Profiling Lab (NFDPL). The court held the evidence of forensic Ballistic Expert seems to be vital importance. In regard non examination, It has not affected the prosecution case on merit of absence of examination of finger prints. Court also said that our mind is realistic, pragmatic and very much in consonance with the relevant prosecution on record.

- **Anjuara Khanam Anjuara Vs State and Ors** 68 DLR (2016) 466

The Court held that Forensic science, "art of taking down the suspect" and expert opinion enough to establish interlink between the offence and offender. A magistrate or any person for that matter a judge, how high so ever, is not an expert in investigation.

- **Haji Mahmud Ali Londoni and Ors Vs The state and Ors** 13 ADC (2016) 678

The chemical expert stated that the victim was died by taking poisonous alcohol but there was no eye witness that accused pushed this alcohol. The rule set aside and convicted.

- **Md Abdus Sabur Mondal Vs The State** 2013 (21) BLT (HCD) 333

The court relied on expert opinion that fertilizer was not adulterated.

- **Mozammel Hossain Shamol ond Ors Vs Mosammat Nazma Begum** 35 BLD (2015) 683

The main point of the case was whether the learned Joint District Judge made any illegality of rejecting the prayer of handwriting expert. It appears that the trial court below without assigning any reason whatsoever rejected the application of handwriting expert opinion with regard to genuineness of the agreement. We are of view that the impugned order of the joint Distinct Judge is totally unsatisfactory.

- **Sheikh Rezaul Karim Vs Govt of peoples Republic of Bangladesh** 3 CLR (2015) 216

Police malafidely prayed for fingerprint expert but the Court did not pay a heed to them because the other materials was sufficient and no need to expert opinion which was prayed malafidely.

- **State Vs Golam Rabbani** 70 DLR (2018) 211

Defense wanted to prove that the death of the deceased was by snake bite but examination of viscera by expert it has come to the limelight that the death was caused for injecting insecticide poison in the body of the deceased. Court relied on expert opinion and the death is confirmed.

- **State Vs Md Saiful Islam and Ors** 22 BLC (2017) 58

The question was whether three limbs of the dead body are of the same person. Post mortem confirmed three limbs was from the same deceased. Dr. AKM Shafiuzzaman Khayer Assistant Professor (DMCH) confirmed it. Conviction was based on the basis of post mortem report plus confession.

- **State Vs Md Sakur Ali** 68 DLR (2016) 155

Doctor confirmed in autopsy report that the death was occurred by throating and then dragged into the water. Conviction was based on the basis of post mortem report plus confession.

- **State Vs Mir Ahmed Hossain and Ors** 2015 (23) BLT (HCD) 509

Death was confirmed on the basis of autopsy report plus evidence of witness. Fingerprints of knife has not been taken the defense raised but Court did not pay a heed to it.

- **State Vs Alamgir** 36 BLD (2016) 79

Cause of death was easily ascertained by autopsy report, so there was no necessity of the examination of viscera by expert and the doctor detected the cause of death easily. Conviction was based on the autopsy report plus circumstantial evidence.

- **Abdul Kader Masum and Ors. Vs The State** 11ADC (2014) 844

In this case a medical expert, on examination of the victim has expressed his opinion that the injuries found on the person are sufficient to cause death in ordinary course of nature. Though the opinion of the expert is not binding upon the court, normally it does not discard the opinion unless it is found on the face of the report and the other evidence on record that the report is tainted with falsehood.

- **State Vs. Abdus Salam and Ors** 21BLC(2016)221

Conviction on the Reliance of the medical expert: The oral evidence of the prosecution witnesses also supported and corroborated by the inquest reports of the dead bodies of the victims as well as the post mortem report of the deceased conducted by doctor, Dr. Anwar Hossain, a Lecturer of Forensic Medicine Division at Dhaka Medical College Hospital. It appears from the post-mortem report that the findings of the doctors in the respective post-mortem report of the victims are very much consistent with his opinion that death of the victims were due to bullet injuries. These material facts were further well proved by the material exhibits which were bullets and those bullets were recovered from the dead bodies of the victim.

11. Recommendations:

1. As to electronic evidence: There is no mention about electronic evidence in our Evidence Act. We recommend a definition of ‘evidence’ in section 3 replacing the existing definition as follows:

“Evidence means all types of proof or probative matter presented and permitted by the Court at a legal proceeding by the act of parties or required by the Court on its own through the medium of witnesses, documents inclusive of electronic records and physical evidence in relation to matters under inquiry.”

Besides we recommend section 45A as follows:

Opinion of Examiner of Electronic Evidence:

“When in a proceeding, the Court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the examiner of electronic evidence is relevant.”

2. As to digital signature: We recommend a section 47A as follows:

“When the Court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying Authority which has issued the Electronic Signature Certificate, is a relevant fact.”

3. As to admissibility: We recommend a section 45B as follows:

Expert reports:

(1) An expert report shall be admissible as evidence in a legal proceeding, if the expert, who wrote the report, gives oral evidence in the proceeding.

(2) If the expert, who wrote the report does not give oral evidence at the legal proceeding, then that expert’s report shall be admissible with leave of Court after the Court examines:

(a) the content of the report;

(b) the reasons why the expert, who wrote the report is not giving oral evidence at the legal proceeding; and

(c) any other circumstances that appear to the Court to be relevant and need to be considered in the interest of justice.

4. As to recognition of non-government expert specifically: Our lawyers have some misconception regarding the admissibility of non-government expert though there is no prohibition in Evidence Act. So we think that there should be specific mention about it. Besides many special law bars non-government expert’s evidence that should be liberalized in specific grounds.

5. As to collection of trace evidence: Efficient police officer should be deployed to collect trace materials. Protocols should be strictly followed.

6. As to increasing number of laboratories: Laboratories should be increased and decentralized.

7. As to equipment: Equipment and facilities should be increased in morgues and laboratories.

8. As to increasing number of experts: As we taken the view of experts, they expressed that there is a shortage of manpower in this regard. Manpower should be increased.

12. Conclusion :

To make justice system smoother and proper, forensic and scientific evidence needs to be revised, updated, reformed and developed. The Evidence Act, 1872 should be amended in accordance with the requirements of age. The scope of committing crimes and offences by using

science and technology are increasing day by day. In its response, to ensure justice to victims, the Evidence Act, 1872 should be amended liberally so that all type of expert evidence can be brought before courts against any kind of offence committed by abusing science and technology. Only amendment of law is not enough. Government should also be very sincere on this issue. And to make forensic evidence more active and effective, government should establish enriched labs, research centers and specialized agency. Government should also furnish researchers with new, modern and advanced technology, research materials, scientific equipment and chemicals. Government should arrange training for researchers, investigators and law enforcing agency members on forensic and scientific evidence. Most importantly, it must be ensured that no forensic evidence can be manipulated by extra-scientific methods.

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Appendix A (Cases we analyzed)

1. State & others vs Md Nazimuddin Yon (LEX/BDHC/0158/2018)
2. State v Shah Alam Kazi (LEX/BDHC/0167/2018)
3. State vs Tofayel Ahmed (71 DLAR 2019 57)
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6. Va Tech Wabag Ltd. Vs (DWASA) 70 DLR (2018) 747
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15. Subroto Pal vs State LEX/BDHC/0272/2017
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